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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 197

VINCENT GIGANTE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILFRED L. DAVIS
166 East 61st Street
New York, New York
Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1962

No.

VINCENT GIGANTE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Vincent Gigante prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the orders of the United States District Court for the Southern District of New York denying petitioner's motion for a new trial.

OPINIONS BELOW

The opinion of the court of appeals is reported at 315 F. 2d 186, and is reported in part at 31 U. S. LAW WK. 2470. Appendix A to this petition prints the opinion as promulgated (App. 1a-11a) and the subsequent modifications (App. 13a, 14a). The opinions of the district court are reported at 197 F. Supp. 536 (per Judge Bicks) and at 200 F. Supp. 711 (per Judge Murphy).

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1963 (App. 12a). Rehearing and rehearing *in banc* were denied on April 10, 1963 (App. 15a). The time for filing of this petition was extended until June 8, 1963, by order of Associate Justice Harlan, entered on May 1, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED[1]

1. Whether the "clearly erroneous" standard, rather than review *de novo*, is applicable to review of district court *in camera* determinations of the producibility of statements under sub-section (e)(2) of the Jencks Act, 18 U.S.C. § 3500(e)(2).

2. Whether interview notes which are not entirely in the witness' own words but are found by the district court to "set forth in substance what the witness said", qualify as a "substantially verbatim recital" within the meaning of the Jencks Act, 18 U.S.C. § 3500 (e)(2).

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[1] The questions presented are the same as those in the petition of petitioner Vito Genovese, who seeks a writ of certiorari from the same judgment below.

3. Whether a government agent's deliberate omission from his interview notes of statements made during periods of the interview when the witness says nothing helpful to the government, or nothing relating to the subject matter of his direct examination, precludes all notes taken during the remainder of the interview from qualifying as "substantially verbatim" under 18 U.S.C. § 3500(e)(2).

4. Whether petitioner's due process or Jencks Act rights were violated by the government's unilateral determination to withhold from the trial judge, after a proper defense request for Jencks materials, extensive interview notes taken by an Assistant United States Attorney, where such notes included statements which would have seriously impeached the testimony of the sole witness against petitioner and been producible under 18 U.S.C. § 3500(e)(2) as interpreted by the trial court.

5. Whether pre-trial destruction of a government agent's interview notes, arguably within 18 U.S.C. § 3500(e), warrants invocation of sanctions under § 3500(d) or otherwise:

(a) where the agent testifies that he destroyed his notes in accordance with regular practice;

(b) where the agent testifies that he destroyed his notes deliberately in order to circumvent the Jencks rule.

6. Whether, if petitioner does not receive a new trial on the basis of asserted Jencks Act violations, the case should be remanded to the district court for reconsideration of the remaining grounds of petitioner's new trial motion in the light of additional evidence first made available to the defense after the motion's denial.

STATUTE INVOLVED

The Jencks Act, 18 U.S.C. § 3500, is printed as Appendix B to this petition (App. 16a-17a).

STATEMENT

Undersigned counsel for petitioner Vincent Gigante is also co-counsel for petitioner Vito Genovese, who seeks review of the same judgment below.

The issues as to both petitioners are simliar and the same questions have been presented by each petitioner. To avoid repetition, petitioner Gigante respectfully adopts the reasons for granting the writ set forth in the petition of Genovese. Petitioner Gigante also adopts the statement of the case contained in the petition of Genovese, and adds the following information pertinent to the evidence concerning petitioner Gigante.

All of the evidence against Gigante was in the form of uncorroborated testimony of the witness Nelson Silva Cantellops. The trial court in its instructions to the jury stated:

> "We shall next consider the evidence relating to the petitioner Vincent Gigante. Only Cantellops testified with respect to him." (Tr. 1099a.)[2]

The principal part of such testimony dealt with an alleged automobile trip made by Cantellops and Gi-

---

[2] Record references herein are cited in the same manner as in the petition of Genovese:

Proceedings on the motion for new trial are cited to petitioner Genovese's appendix in the court of appeals (vols. I through IV). These citations have the suffix "a" and no prefix. Proceedings on the original trial are cited to the appendix to petitioner Genovese's brief on the appeal from conviction, which was rebound as a separate appendix volume to petitioner Genovese's brief on the instant appeal. These citations have the prefix "Tr." and the suffix "a".

gante to Lorain, Ohio, from which point Cantellops departed by bus for Cleveland, about a one hour's drive from Lorain, to deliver narcotics. (See Tr. 291a-93a.)

The only other evidence relating to Gigante placed him as the driver of the car in which Genovese and Cantellops proceeded up the West Side Highway to a meeting in defendant Mazzie's house in the Bronx (Tr. 338a-42a). Gigante did not attend any part of the meeting (Tr. 342a; *cf.* Tr. 350a). See *United States* v. *Aviles*, 274 F. 2d 179, 189 (2d Cir.), *cert. denied*, 362 U.S. 974, 982, *rehearing denied*, 363 U.S. 858 (1960). However, it was the evidence of Gigante's participation in the Lorain-Cleveland trip which provided the basis for the court of appeals' affirmance of his conviction. *Ibid.*

At trial Cantellops admitted that he had given the grand jury a different account of his Cleveland trip. According to that account, given in March of 1958, Cantellops had traveled from New York to Cleveland by bus, and Gigante was in no way involved.

> "Q. Did you ever swear before a jury or a grand jury, rather, a grand jury, that you took this trip by bus; yes or no? A. Yes, I reached Cleveland by bus.
>
> Q. If you will just listen to me: Did you ever swear before the grand jury that you made this Cleveland trip by Greyhound bus; yes or no? A. Yes.
>
> Q. Tell us the details of what you said to the grand jury about your trip by bus to Cleveland, when you testified about the Cleveland trip by bus—tell us what you told the grand jury, everything you told the grand jury about that trip to

Cleveland, and I will tell you the date, when I want you to do that.

Mr. Christy: Objection, your Honor.

The Court: Let us get the facts. Did you go by Greyhound bus?

The Witness: Now, I correct that mistake, and I rectify it—

The Court: Did you go by Greyhound bus?

The Witness: No, by bus from Lorain to Cleveland, but I was riding by car from here to Lorain, Ohio.

The Court: Did you ever testify before the Grand Jury that you had gone by Greyhound bus straight from New York through to Cleveland?

The Witness: Yes, your Honor, and I had a reason to do it and I did it and I am sorry for it.

The Court: Strike it out.

Q. Let me see if I can refresh your recollection of what you testified to before the Grand Jury.

The Court: What is the point of refreshing his recollection? He has already told us that he testified before the Grand Jury that he went from New York through to Cleveland by Greyhound bus." (Tr. 626a-627a.)

At the hearing on petitioner's motion for new trial, the occasion for Cantellops' change in his story concerning the Lorain-Cleveland trip was developed in the testimony of former narcotics agent Rowan. The latter testified that his investigation of certain bus schedules had revealed a fatal discrepancy in Cantellops' account of the trip (1249a-51a). Rowan had then informed Assistant United States Attorney Tendy of this discrepancy (1253a-54a), and as a result, in

June of 1958, Cantellops finally told Tendy in a private interview that he had made the trip to Lorain by car with Gigante (1254a-61a). Cantellops also told Tendy that Genovese was involved in the case (1257a, 1261a). Tendy thereafter informed Rowan and Assistant United States Attorney Walsh of this development in Cantellops' story (1261a). Rowan's testimony as to this matter was uncontradicted. It was corroborated by agent Enright insofar as it was within the latter's knowledge (see 1510a-11a), and the government did not call Tendy or Walsh. Rowan had destroyed his notes on the matter (1249a), so that they were unavailable for production at trial.

REASONS FOR GRANTING THE WRIT

As stated above, petitioner Gigante respectfully adopts the reasons for granting the writ of certiorari set forth in the petition of petitioner Genovese, since the issues concerning both petitioners are similar and the same questions have been presented.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WILFRED L. DAVIS
166 East 61st Street
New York, New York

Counsel for Petitioner

June 7, 1963

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 66—October Term, 1962

(Argued December 18, 1962 Decided March 8, 1963)

Docket No. 27377

UNITED STATES OF AMERICA, *Appellee*,

v.

ALFREDO AVILES, CHARLES BARCELLONA, CHARLES DI PALERMO, JOSEPH DI PALERMO, NATALE EVOLA, VITO GENOVESE, VINCENT GIGANTE, DANIEL LESSA, NICHOLAS LESSA, ROCCO MAZZI, CARMINE POLIZZANO, RALPH POLIZZANO and SALVATORE SANTORA, *Defendants-Appellants*.

Before:

WATERMAN, MOORE and MARSHALL, *Circuit Judges*.

Consolidated appeals from denials of appellants' motions for a new trial, United States District Court for the Southern District of New York, Bicks, *J.*, and Murphy, *J.*, pursuant to Rule 33, Fed. R. Crim. P. Affirmed.

VINCENT L. BRODERICK, United States Attorney, Southern District of New York (Arnold N. Enker, Arthur I. Rosett, Richard A. Givens, Asst. United States Attorneys, of counsel), *for appellee.*

ROY L. REARDON, New York City, *for appellant Barcellona.*

ALBERT J. KRIEGER, *for appellants Joseph Di Palermo, and Charles Di Palermo.*

MAURICE EDELBAUM, New York City, *for appellant Evola.*

EDWARD BENNETT WILLIAMS, Washington, D. C.; ROBERT L. WEINBERG, Washington, D. C.; WILFRED L. DAVIS, New York City, *for appellant Genovese.*

WILFRED L. DAVIS, New York City, *for appellant Gigante.*

HENRY K. CHAPMAN, New York City, *for appellants Nicholas Lessa and Rocco Mazzi.*

ALLEN S. STIM, New York City, *for appellant Ralph Polizzano.*

HERBERT S. SIEGAL, *for appellant Santora.*

WATERMAN, *Circuit Judge:*

After a three months' jury trial in the Southern District of New York, appellants were convicted, on April 17, 1959, of conspiracy to violate federal narcotic laws, 21 U. S. C. §§ 173, 174. Their convictions were affirmed on appeal to this court, 274 F. 2d 179, and the Supreme Court denied certiorari, 362 U. S. 974, 982, *rehearing denied*, 363 U. S. 858.

On August 26, 1960, appellants moved in the district court for a new trial, Rule 33, Fed. R. Crim. P., and put forth, as grounds for their motions: (1) alleged recantations of trial testimony by the principal government witness, Nelson Cantellops; (2) statements by Cantellops at the hearing on the motions for a new trial which were allegedly

inconsistent with his original testimony; (3) allegedly new extrinsic evidence tending to establish Cantellops' perjury in his trial testimony concerning a certain trip to Las Vegas, Nevada; (4) alleged concealment at the trial of a rent record in the possession of the Government; (5) alleged post trial statements by Cantellops which tended to discredit his trial testimony; (6) alleged spoliation of notes of federal Narcotics Agents Rowan, Consoli, and Muglia, in violation of the Jencks Act, 18 U. S. C. § 3500; and (7) failure of the Government to make available to the trial court certain interview notes of Assistant United States Attorney Donald H. Shaw, which notes were allegedly producible under the Jencks Act, 18 U. S. C. § 3500.

After extended hearings, Judge Bicks, who had presided at the original trial, denied appellants' motions insofar as they rested upon grounds 1 through 6 set forth above. 197 F. Supp. 536. He reserved decision with respect to the Shaw interview notes, indicating his intention to take further testimony regarding this issue. Due to the illness of Judge Bicks, however, the contemplated voir dire examination was not held. Judge Murphy was subsequently assigned to conduct the hearing and make a determination as to the ground upon which Judge Bicks had reserved decision. On December 22, 1961, Judge Murphy denied the motions for a new trial. 200 F. Supp. 711.

From these orders below adverse to them appellants now prosecute this consolidated appeal claiming that the grounds set forth above are individually and collectively sufficient to entitle them to a new trial under Rule 33, Fed. R. Crim. P. As to the grounds 1 through 6 set forth above, we affirm the order below on the careful opinion of Judge Bicks. As to the Shaw interview notes, we affirm the order of denial below for the reasons set forth hereafter.

During the course of the original trial, defense counsel inquired, following the direct examination of the Govern-

ment's principal witness, Nelson Cantellops, whether the United States Attorney had in his possession

> "any report or memorandum prepared by a government agent concerning any interview that was conducted with [Cantellops] at any time, under the Jencks decision and under 3500."

The Government subsequently made available to the court what were represented to be "the complete files of the Bureau of Narcotics" on Nelson Cantellops. No interview notes of Assistant United States Attorney Shaw were included in these materials, and, despite the fact that prior testimony indicated extensive questioning of Cantellops by Shaw, defense counsel made no further request for, nor objection to the nonproduction of, any Shaw notes still in existence.

Specific requests and objections relative to the Shaw notes were not made by counsel for appellants until the hearings below on the motions for a new trial. During the course of these hearings Shaw himself testified concerning notes he had taken of some 20 to 30 interviews with Cantellops, and of a "chronological statement of facts," prepared from these notes and other sources, concerning Cantellops' involvement in the alleged conspiracy.

Upon demand by counsel for appellants, the Government produced for Judge Murphy's *in camera* inspection two envelopes labeled, respectively, "Former Assistant U. S. Attorney Shaw's Chronology" and "Original Notes and Assorted Miscellany of Former Assistant U. S. Attorney Shaw."

In ruling on appellants' motions, Judge Murphy separated the Shaw materials into three groups:

(1) Materials which were not "substantially verbatim recitals" of Cantellops' statements. Into this group were placed Shaw's "chronology of facts," together with certain

of Shaw's "original notes and assorted miscellany." Ruling that these materials would not have been found producible under 18 U. S. C. § 3500 had then been made available for the court's inspection during the original trial, Judge Murphy concluded that their nonproduction was not prejudicial to appellants' interests. See *Rosenberg* v. *United States*, 360 U. S. 367, 370 (1959). We cannot say that Judge Murphy's findings with respect to these materials were clearly erroneous.

(2) Materials which were "probably Jencks' statements." Judge Murphy ruled that the nonproduction of this second group of materials, into which was placed "the great majority" of Shaw's original interview notes, was nonprejudicial to appellants on the ground that "virtually the[ir] entire contents" "correspond[ed] with the grand jury testimony of Cantellops which was turned over to the defense."

(3) Notes which "most assuredly should have been produced pursuant to § 3500." This group consisted of handwritten interview notes dated October 10 and 11, 1957. Although these notes contained new impeaching information not otherwise available to appellants, Judge Murphy ruled that nonproduction of these notes did not prejudice defendants' interests, in that defendants' cross-examination of Cantellops was not "unduly restricted" thereby:

> "• • • this witness was subjected to a most complete and searching cross-examination by able and experienced counsel during a period of 14 trial days, in the course of which his character and credibility were thoroughly explored and devastatingly attacked. The facts of his considerable prior criminal activities, his affliction with a loathsome disease, his immorality, his perjuries and his motive to misrepresent were all paraded before the jury without quarter. To be able with the use of the October notes to show that Cantellops spoke untruthfully on yet another occa-

sion * * * would simply add umber to an already blackened witness." 200 F. Supp. at 717.

Appellants now vigorously contend that in so ruling with respect to the second two groups of Shaw materials, Judge Murphy misapplied the test of harmless error laid down in *Rosenberg* v. *United States, supra,* and *United States* v. *Consolidated Laundries Corp.,* 291 F. 2d 563 (2 Cir. 1961).

The Government argues, for its part, as it did below, first, that appellants waived all right to object to the nonproduction of the Shaw materials by their failure to demand these materials, or to object to their nonproduction, at trial; second, that the materials constituted an attorney's work product, and as such were not producible under 18 U. S. C. § 3500; third, that the materials were neither statements of a witness, nor substantially verbatim recitals of such statements, and, for this reason, were not producible under the Jencks Act, 18 U. S. C. § 3500.

Because of our disposition of the Government's contentions, we do not reach the issue of harmless error from which appellants direct their major attack upon the order of Judge Murphy below.

We consider, first, the Government's suggestion that appellants are precluded from objecting to the nonproduction of the Shaw materials by failure properly to demand the materials, or to object to their nonproduction, at trial.

After the direct examination of Nelson Cantellops at the original trial, defense counsel asked, as indicated above, whether the United States Attorney had in his possession

> "any report or memorandum prepared by a government agent concerning any interview that was conducted with this witness at any time, under the Jencks decision and under 3500."

The court thereupon directed that "any such statement" be made available to counsel.

Counsel for the Government subsequently stated in open court:

> "The United States Attorney's office has examined all the reports in this case and we find that there is no report which would fall within the ambit of Section 3500 and therefore need not be turned over to defense counsel."

When the court asked whether there was "any report whatever" that dealt with Nelson Cantellops, government counsel responded affirmatively, and Judge Bicks declared that he would examine those reports to determine whether they fell within Section 3500.

The Government now argues that defense counsel's request for "any report or memorandum prepared by a government agent" encompassed only reports of "Agents" of the Bureau of Narcotics, and not those of Assistant United States Attorneys, who, it is sought to have us believe, are not "government agents." Even if Shaw's materials were producible under the Jencks Act, the Government contends that, by their failure to make a timely demand, appellants are precluded from raising the issue upon this motion for a new trial.

Ours is an adversary system of criminal justice. It is not, however, a "game of verbal jackstraws," the object of which is to see whether the actions of either the Government or the defense can be pulled out from under the language of applicable statutes, the demands of opposing counsel, or the orders of the court, without disturbing any of the latter. Cf. Llewellyn, Jurisprudence 445 (1962). By enacting the Jencks Statute, 18 U. S. C. § 3500, Congress provided criminal defendants with a sharply circumscribed, but nonetheless important, right to obtain information from

the prosecution in criminal proceedings. To utilize that right, defense counsel must proceed with unusual diligence. Counsel is entitled to no statements of a government witness until the witness has testified on direct examination, yet the statement is unlikely to be of value unless it is secured and studied by counsel prior to cross-examination. Counsel must often frame requests under the Act with little or no information concerning the circumstances under which, or the agents to whom, the witness may have given producible statements. Moreover, defense counsel ordinarily has no basis upon which to object to government nonproduction of requested statements where unspecified materials are retained by the court following *in camera* inspection.

To these impediments to an effective invocation of Jencks Act rights by defendants in criminal cases the Government would now add the niceties of ancient common law pleading in the formulation of demands for producible statements. Of course the Act does not require that demands for statements must be of precise nicety, and we are unwilling to hold that such requests be couched in formal or technical language.

The Government further argues that the Shaw materials were the work product of an attorney and as such were not producible under 18 U. S. C. § 3500. In so arguing, the Government relies principally upon *Hickman* v. *Taylor*, 329 U. S. 495 (1947) and the public policy reflected therein. *Hickman* v. *Taylor*, however, was concerned solely with discovery in civil proceedings. The obtaining of statements of witnesses in the hands of the prosecution which the defense may use for impeachment purposes in criminal trials is made possible by the Jencks Act. That act makes no distinction among statements on the basis of the purpose for which they were recorded or the type of government agent to whom they were made. *Saunders* v. *United States*, — F. 2d — (D. C. Cir. 1963) (No. 17,122).

We are brought, finally, to the Government's contention, vigorously argued below and renewed on this appeal, that the Shaw interview notes were not "substantially verbatim recitals" of statements by Nelson Cantellops, and thus were not producible under the Jencks Act. If the Government's contention be upheld on this point, it follows that appellants' motions for a new trial were properly denied, insofar as they rested upon nonproduction of the Shaw materials. Appellants cannot have been prejudiced by the nonproduction of materials which, even had they been disclosed to the trial court for *in camera* inspection, would not have been found producible for defendants' use under the Act.

In ruling that the October 10 and 11 notes were Jencks "statements," and that the great majority of Shaw's other original interview notes were probably "verbatim recitals" within the Act's definition, Judge Murphy relied solely upon the notes themselves and upon the record of Shaw's earlier testimony before Judge Bicks. Judge Murphy conducted no voir dire examination of Shaw and received no testimony from any other witness prior to ruling upon this portion of appellants' motions.[1] As we have available to us all of the materials upon which Judge Murphy based his rulings, our conclusion with respect to this factual issue is entitled to no less weight than that of the Court below.

In determining whether the Shaw notes were "statements" within the Jencks Act definition of that term, 18 U. S. C. § 3500(e), the cases provide certain well-defined criteria to assist us. Such a statement must, of course, be "a substantially verbatim recital of an oral statement made

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[1] Judge Murphy was not, of course, required to conduct a voir dire examination of Shaw, or to hold any hearing whatever, before determining whether these disputed documents were within the Jencks Act. As the Supreme Court said in *Palermo* v. *United States*, 360 U.S. 343, 344-45 (1959), it is "the function of the trial judge to decide in the light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement."

by [the] witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." 18 U. S. C. § 3500(e)(2). The statement must fairly be "the witness' own words." *Palermo* v. *United States*, 360 U. S. 343, 352 (1959). It must "reflect fully and without distortion what had been said to the government agent." Ibid. The distortion which Congress sought to avoid by its narrowly-drawn definition "can be the product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions." Thus, "a report which merely selects portions, albeit accurately, from a lengthy oral recital" will not be producible under the Act. Ibid.

In applying these criteria to the Shaw interview notes, we may consider, as did Judge Murphy, the general tenor of the notes themselves, Shaw's extensive testimony before Judge Bicks concerning the interviews and notes, and Shaw's affidavit, submitted to Judge Murphy in support of the Government's motion for reargument below and properly part of the record on this appeal.

Shaw testified at the post-trial hearing before Judge Bicks that he met with Cantellops 20 or 30 times over the course of almost a year. He testified that Cantellops spoke rapidly and in poor English, requiring that he "almost translate it and put it into a more recognizable form of English".[2] He stated that the notes were never read back to Cantellops, that Cantellops never signed or initialed them, and that only about one half of the notes contained information elicited from Cantellops, the remainder containing information coming from "close to a dozen differ-

[2] This testimony is supported by the testimony of Narcotics Agent Rowan before Judge Bicks that it was "impossible" for him to keep up with Cantellops' statements in his note-taking, and that Cantellops spoke rapidly, in bad English, ungrammatically and indistinctly. Judge Bicks, himself relying on his familiarity with Cantellops' testimony during the trial, indicates agreement with this characterization of Cantellops' speech habits. 197 F. Supp. at 557.

ent sources." Finally, Shaw testified that it was his practice to go over the notes after the interview and make additions to them, as the notes were taken not for the purpose of providing a record of Cantellops' testimony, but to assist Shaw in drafting the chronological statement and to serve as a guide in interrogating Cantellops before the grand jury.

Shaw's affidavit, submitted to Judge Murphy in support of the Government's motion for reargument, substantiates the foregoing, and adds that Shaw was selective in his note-taking and did not record the testimony that he thought was "incoherent, illogical or in conflict with what the assistant then knew to be the fact from other witnesses."

Finally, the documents themselves indicate that they are the result of a process of selection. They are not as voluminous as they would be if they were complete transcriptions of Shaw's 20 to 30 interviews with Cantellops. Further, the signs of addition and interpolation are evident on the face of the documents.

We hold, consequently, that the Shaw materials contained no statements which, had they been delivered to the trial court for *in camera* inspection, would have been found to be producible under the Jencks Act.[3] The orders of Judge Bicks and Judge Murphy, denying appellants' motions for a new trial, are, accordingly, affirmed.

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[3] Our conclusion in this respect should not be read as a condonation of the Government's failure to deliver the Shaw materials to the trial court for *in camera* inspection. We fully concur in Judge Murphy's disapproval of the Government's reprehensible actions in this respect. 200 F. Supp. at 714. In *Palermo v. United States*, 360 U.S. 343, 354 (1959), the Supreme Court laid down the rule that even before that time was the practice in this circuit: "When it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit the statement to the trial judge for an *in camera* determination. Indeed, any other procedure would be destructive of the statutory purpose."

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of March one thousand nine hundred and sixty-three.

Present: HON. STERRY R. WATERMAN, HON. LEONARD P. MOORE, HON. THURGOOD MARSHALL, *Circuit Judges.*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

ALFREDO AVILES, ET AL., *Defendants,*

CHARLES BARCELONA, ET AL., *Defendants-Appellants.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

A true copy,
A. DANIEL FUSARO
Clerk

Letter Modifying Opinion

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Chambers of
Sterry R. Waterman
U.S. Circuit Judge
P.O. Box 178
St. Johnsbury, Vermont

March 19, 1963

A. Daniel Fusaro, Clerk
U. S. Court of Appeals, 2 Cir.
U. S. Court House
Foley Square
New York 7, N. Y.

Dear Mr. Fusaro; In re: Docket No. 27377
U.S. v. *Aviles, et al*

Will you please make the following change in the above opinion:

> On slip sheet 1354, footnote 3, please strike the second sentence and insert in lieu thereof: "See Judge Murphy's discussion, 200 F. Supp. at 714."

Thank you very much.

Sincerely,

/s/ Sterry R. Waterman
Sterry R. Waterman

A true copy,
A. Daniel Fusaro
Clerk

Letter Modifying Opinion

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Chambers of
Sterry R. Waterman
U.S. Circuit Judge
U.S. Court House
New York 7, N.Y.

March 28, 1963

Memo to ADF

In re: Docket No. 27377
United States v. Aviles et al.

Dear Mr. Fusaro:

Will you please notify everyone who is entitled to be notified that the opinion in this case is modified by the deletion of the word "clearly" where it appears in the last line of subparagraph (1) on page 1347 of the slip sheets. Sentence will now read:

> "We cannot say that Judge Murphy's findings with respect to these materials were erroneous."

Sincerely,

/s/ STERRY R. WATERMAN
Sterry R. Waterman

Copy to West Pub. Co.

A true copy,
A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *Appellee*,

v.

ALFREDO AVILES, ET AL., *Appellants*.

Denial of Petition for Rehearing

Wilfred L. Davis, New York, N.Y., for appellant Vincent Gigante.

Petition denied.

S. R. W.
L. P. M.
T. M.
U.S.C. JJ.

10 APR 1963

Denial of Petition for Rehearing In Banc

Wilfred L. Davis, New York, N.Y., for appellant Vincent Gigante.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

10 APR 1963

APPENDIX B

Text of the Jencks Act, 18 U.S.C. § 3500:

§3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event

the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.